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NO. 789

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,

Petitioners,

vs.

COMMONWEALTH EDISON COMPANY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Names and Addresses of Counsel Appear at the end of this Petition)

TWENTIETH CENTURY PRESS, INC., CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, defendants in a group of private treble damage antitrust actions involving electrical equipment products brought in the Northern District of Illinois, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on September 12, 1963, rehearing denied October 30, 1963, insofar as it held, reversing the district court, that judgments based on pleas of guilty are admissible as prima facie evidence in these cases under Section 5(a) of the Clayton Act.

OPINIONS BELOW

The opinion of the court of appeals, together with the dissenting opinion of Judge Knoch, is reported at 323 F.2d 412 (7th Cir. 1963) and is reprinted as an appendix to this

petition at pp. A-1-A-8. The opinion of the district court by Judge Robson, is reported at 211 F. Supp. 712 (N.D.Ill. 1962) and the opinion and order appear at Plt. App. 44-80.[1]

JURISDICTION

The opinion of the court of appeals was entered September 12, 1963. The petition for rehearing, timely filed pursuant to an order of the court of appeals entered September 18, 1963, extending the time for filing the petition to October 14, 1963, was denied on October 30, 1963. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE AND RULE INVOLVED

The full text of Section 5 of the Clayton Act at the time of its enactment in 1914 was as follows (the proviso in issue is italicized) (38 Stat. 731 (1914)):

> "That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: Provided further,* This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in

1. The appendix to this petition is cited "App. —"; the appendix filed by the respondents, Commonwealth Edison Co., et al., in the court of appeals is cited "Plt. App. —"; the appendix filed by petitioners in the court of appeals is cited "Dft. App. —".

equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken."

Section 5 was amended in 1955 to become Section 5(a), but the changes in the text are not significant here. The second proviso, which never had more than temporary application, was repealed. The wording of the affirmative provision of Section 5 was changed to make the section applicable to final judgments or decrees "heretofore or hereafter rendered" and the description of the kinds of cases to which it applied, "in any criminal prosecution or in any suit or proceeding in equity", was changed to accord with the terminology of the Federal Rules, "in any civil or criminal proceeding". The statute now reads (69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1959)):

> "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken* or to judgments or decrees entered in actions under Section 15a of this title."

The full text of Rule 11 of the Federal Rules of Criminal Procedure is as follows:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not

accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

QUESTION PRESENTED

Whether judgments in criminal antitrust cases based on pleas of guilty entered before any testimony was taken are "consent judgments" within the meaning of the proviso to Section 5(a) and exempt, therefore, from the prima facie effect that the section otherwise confers on a "judgment or decree . . . in any civil or criminal proceeding. . . ."

STATEMENT

A sharply divided court of appeals reversed the interlocutory order entered by the district court to strike from the complaint in these proceedings references to prior criminal proceedings brought against petitioners in the Eastern District of Pennsylvania in 1960 and terminated in pleas of guilty, although the court of appeals unanimously affirmed the order to strike references to actions terminated in pleas of *nolo contendere*. These actions were instituted against petitioners, all electrical equipment manufacturers, seeking treble damages under Section 4 of the Clayton Act (38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1959)) for alleged violations of Section 1 of the Sherman Act (26 Stat. 207 (1890), as amended, 15 U.S.C. § 1 (1959)). The complaint references to the prior criminal proceedings had been included on the theory that the criminal judgments would constitute prima facie evidence against petitioners in the civil actions by virtue of Section 5(a) of the Clayton Act (38 Stat. 731 (1914), as amended, 15 U.S.C. § 16(a) (1959)).

The majority of the court of appeals reversed Judge Robson's order insofar as it affected the pleading of prior guilty plea judgments on the theory that such judgments are not "consent judgments" within the meaning of the proviso to Section 5(a). The proviso expressly exempts consent judgments from the prima facie evidentiary status the section otherwise accords prior judgments in government proceedings. Judge Knoch wrote a dissenting opinion (App. 7-8) demonstrating that judgments entered on guilty pleas filed before any testimony is taken are consent judgments under even the most liberal construction of the proviso's terms and pointing out that the legislative history conclusively supports the view that the proviso was intended to remove guilty plea judgments from the sanction of Section 5(a).

The guilty plea judgments in question were entered at Philadelphia in response to seven of twenty indictments, each relating to a separate electrical equipment product line. In only two of those seven cases did all defendants enter pleas of guilty. All of the judgments were entered before any testimony was taken. The negotiations between the parties leading to an agreed entry of pleas in these cases is summarized in the affidavit of Howard Aibel, filed in support of petitioners' motion in the district court (Dft. App. 1-11), which also sets forth pertinent excerpts about those negotiations taken from the Philadelphia transcript (Dft. App. 6-11).

The decision of the court of appeals, which petitioners ask this Court to review, was limited to the problem of statutory construction certified to it, "whether plaintiffs in their private antitrust cases may have the prima facie evidentiary benefit provided by 5(a) of the Clayton Act with respect to judgments entered on pleas of nolo contendere and guilty in prior criminal antitrust cases against

the same defendants." (App. 1-2.) The question was certified and heard by the court of appeals under the Interlocutory Appeals Act as "a controlling question of law . . . [determination of which] may materially advance the ultimate termination of the litigation . . ." (28 U.S.C. § 1292(b)). Both courts below, as well as all of the interested parties, recognized the importance in this complex, multiple litigation of having a uniform determination of this issue in advance of the several trials.

ARGUMENT

No "judgment or decree . . . in any civil or criminal proceeding" brought by the government may operate as prima facie evidence under Section 5(a) of the Clayton Act in a subsequent private antitrust action if, under the proviso thereto, it is a "consent judgment or decree entered before any testimony has been taken. . ." The proviso was added to Section 5(a) in the conference committee to resolve a dispute between the two houses as to whether the section's prima facie rule should apply to *any* criminal judgment. In the spirit of compromise the committee retained the statute's application to criminal judgments, added in the Senate, but sought to accommodate the apparently conflicting policies of aiding treble damage plaintiffs and of

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2. The House bill applied only to equity cases and limited the prima facie rule to matters which would create an estoppel as between the original parties (H.R. Rep. No. 627, 63d Cong., 2d Sess. 2 (1914)). Equity consent decrees, which do not ordinarily create such an estoppel, would therefore as a general rule have been exempt from the prima facie provisions of that bill (see p. 12, *infra*). The Senate accepted the estoppel language but amended the bill to make it apply to criminal as well as equity cases (51 Cong. Rec. 13898 (1914)) and thereby brought guilty plea judgments within the proposed prima facie rule.

aiding government enforcement of the antitrust laws by adding the proviso encouraging defendants to consent to judgment before trial. See 51 *Cong. Rec.* 16003-4 (1914).

The decision of the majority of the court of appeals below holding the proviso inapplicable to judgments based on pleas of guilty—the very judgments to which the proviso was originally primarily directed—would destroy that compromise and by judicial fiat nullify the important congressional policy abjuring interference with government antitrust enforcement and, instead, restore the rejected Senate proposal as the law of the land. The appellate ruling thus threatens to overturn the intent of Congress and the interpretation placed on the section by the federal courts and to create new obstacles to effective administration of the antitrust laws.

The holding of the court below is contrary to that reached and respected in earlier decisions and to those of recent district court decisions. This Court should grant certiorari in order to resolve existing and potential conflict and to ensure a uniform and proper construction of this important antitrust provision.

Section 5(a) governs the evidentiary use that plaintiffs in private antitrust actions can make of judgments obtained in prior government actions and, accordingly, affects the rights of all parties to private antitrust litigation following in the wake of criminal antitrust action. By its influence, foreseen by Congress, on the willingness of defendants in criminal antitrust cases to enter pleas of guilty, the section, including its proviso has far-reaching import for the administration and enforcement of the antitrust laws. The Court, in *Emich Motors* v. *General Motors*, 340 U.S. 558 (1951), has already recognized the significance of Section 5(a), and the value of uniform construction and application of it, by granting certiorari to review a question involving inter-

pretation of its main clause. This petition concerns the proviso to Section 5(a), a part of the section not involved in the *Emich* case and never before considered by the Court.

A well-reasoned and comprehensive opinion on the proviso by Judge Nordbye in *Twin Ports Oil Co. v. Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941), reached the conclusion, contrary to that of the court of appeals below, that guilty plea judgments are exempt from Section 5(a) under its proviso. We think it fair to say that to the time of the inception of the present litigation *Twin Ports* was generally recognized by the federal judiciary as the definitive exposition of the effect of the proviso. See, e.g., *Barnsdall Ref. Corp. v. Birnamwood Oil Co.*, 32 F.Supp. 308 (E.D.Wis. 1940); *Alden-Rochelle, Inc. v. ASCAP*, 3 F.R.D. 157 (S.D.N.Y. 1942). Indeed, we know of no reported case, either before or after *Twin Ports*, in which a judgment based on a plea of guilty has been admitted in evidence under the aegis of Section 5(a).

The question once thought settled has now been reconsidered in five circuits in cases that are a part of this "electrical equipment" litigation. In the Eighth Circuit the proviso has been held, in accord with *Twin Ports*, to exempt judgments based on pleas of guilty, and no appeal has been taken. *N. W. Electric Power Coop., Inc. v. General Electric Co.*, 30 F.R.D. 557 (W.D. Mo. 1961) by Judge Duncan. Thoughtful opinions similarly holding guilty plea judgments outside Section 5(a) were written by Judge Byrne in *Department of Water & Power v. Allis-Chalmers Mfg. Co.*, Trade Reg. Rep. (1963 Trade Cas.) ¶ 70,656 (S.D.Cal. 1963) and Judge Spears in *City of San Antonio v. General Electric Co.*, Civil No. 3063, W.D. Texas, Dec. 7, 1962, and are presently pending on appeal before the Ninth and Fifth

Circuits, respectively. A decision considering the question but reserving it for later separate decision at each of the several trials of the many actions there involved was written by Judge Feinberg in *Atlantic City Electric Co. v. General Electric Co.*, 207 F. Supp. 620 (S.D.N.Y. 1962); no appeal to the Second Circuit has been taken.

2. The decision below overlooks the necessary effect of this Court's decision in *Emich Motors v. General Motors*, 340 U.S. 558 (1951), on the construction of the proviso. The prima facie rule of Section 5(a) is limited by its terms to "matters respecting which said judgment or decree would be an estoppel as between the parties thereto", and in *Emich* the Court construed that language as incorporating the common law doctrine of collateral estoppel into the main provision of Section 5(a). Thus a criminal judgment offered under Section 5(a) can have no broader evidentiary effect than it would have in a later action involving the original parties. The court below held the proviso's intended application to criminal judgments to be limited to judgments based on pleas of *nolo contendere*. But *nolo* judgments, as this Court has affirmed, create no "estoppel as between the parties thereto" and, accordingly, are not within the basic provision of Section 5(a).[3] The appellate court's holding reduces, therefore, to the proposition that the proviso's function is to exclude from the operation of Section 5(a) judgments that, by the settled terms of its main provision, could never come within it.[4] In short, the

3. Hudson v. United States, 272 U.S. 451, 455 (1926); United States v. Norris, 281 U.S. 619 (1930).

4. See Ulrich v. Ethyl Gasoline Corp., 2 F.R.D. 357, 359 (W.D. Ky. 1942); A. B. Dick Co. v. Marr, 95 F. Supp. 83, 101 (S.D. N.Y. 1950); United States v. Jones, 119 F. Supp. 288, 290-291 (S.D. Cal. 1954); United States v. B. F. Goodrich Co., Trade Reg. Rep. (1957 Trade Cas.) ¶ 68,713 at p. 72,871 (D. Colo., Feb. 15, 1957).

decision renders the proviso a redundancy. It is indisputable, however, that when a statute admits a reasonable construction which gives effect to all of its provisions, a construction which makes one part redundant should be rejected. *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307-308 (1961).

The unequivocal legislative history of Section 5(a) establishes that Congress did not intend the proviso to be redundant. As the court of appeals itself found, a clearly defined purpose motivated its drafting and adoption by the proviso. "Congress sought to aid antitrust enforcement by encouraging defendants to capitulate, at a saving of time and expense to the Government" (App. 5). Certainly Congress would not have taken the trouble to add a proviso intended to embody and carry out so definite a policy if that policy were already sufficiently fostered by the language of the section's affirmative provisions. The legislative history shows, to the contrary, that it was specifically the guilty plea exemption that Congress conceived as effectuating the policy of encouraging "capitulation" or "surrender" (terms used repeatedly by proponents of the proviso), a policy developed by the conference committee in consultation "with the Attorney General of the United States and a great many men . . . interested in the execution of the trust laws . . ." (51 *Cong. Rec.* 16276 (1914)). At the time of its enactment it was agreed that the proviso's primary purpose and justification was

United States v. Cigarette Merchandisers Ass'n, 136 F. Supp. 212, 213 (S.D. N.Y. 1955); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 378 (D. Minn. 1939); Barnsdall Ref. Corp. v. Birnamwood Oil Co., 32 F. Supp. 308, 312 (E.D. Wis. 1940); Department of Water and Power v. Allis-Chalmers Mfg. Co., Trade Reg. Rep. [1962 Trade Cas.] ¶ 70,656 at p. 77,667 (S.D. Cal., Jan. 22, 1963); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D. N.Y. 1955).

to "induce" defendants in criminal antitrust cases "to come in and plead guilty" (*id.* at 15939).

Opposition to the proviso in fact centered on its intended effect of exempting judgments based on pleas of guilty from the operation of the section. Proponents of the proviso, including the conferees who drafted it, accepted that interpretation without apology and, indeed, vigorously defended what was in their view a salutary result. For example, an opponent of the proviso posed this question to Senate Conferee Chilton: "Now, is it [a 'trust'] ... admitted its guilt, and if a private party had a suit against that concern for damages, why should not he be permitted to show that this institution had admitted its guilt?" (51 *Cong. Rec.* 16003.) In answer Senator Chilton, accepting without question the construction of the proviso as exculpating guilty plea judgments, protested that in the view of the six conferees this exclusion was fair and furthered the public interest (*id.* at 16004). Similarly, Senate Conferee Overman agreed that the proviso prevented "making it [a

5. See Judge Nordbye's exhaustive study and analysis of the legislative history in Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941). The complete citations to the legislative history of the proviso to Section 5 here in dispute are as follows: *Hearings before the House Committee on the Judiciary*, 63d Cong., 2d Sess. ser. 7, pt. 24, 2423-28, 2745, 2870-82, 4911; H. R. Rep. No. 627, 63d Cong., 2d Sess. 2, 14 (1914) (Minority Report); H. R. Rep. No. 627, Pt. 2, 63d Cong., 2d Sess. 9-10 (1914); H. R. Rep. No. 627, Pt. 3, 63d Cong., 2d Sess. 5 (1914); House Debates (Original Bill), 51 Cong. Rec. 9079-80, 9090-91 (1914); S. Rep. No. 698, 63d Cong., 2d Sess. 10-45 (1914); Senate Debates (Original Bill), 51 Cong. Rec. 13858-59, 13868-13907 (1914); Conference Committee Report, S. Doc. No. [illegible], 63d Cong., 2d Sess. 4 (1914); Senate Debates, 51 Cong. Rec. 15821-27, 15938-40, 16001-04, 16046-47, 16058-59, 16144, 16170 (1914); House Debates, 51 Cong. Rec. 16270, 16312, 16344 (1914).

plea of guilty") prima facie evidence", and he added, "*it ought to*" (*id.* at 15825). In the House, Conferee Webb, asked whether the prima facie rule would attach to a judgment entered on a "plea of guilty", affirmed that because of the proviso "such judgment does not have a 'prima facie' effect . . ." (*id.* at 16276).

The court of appeals, on the basis of the plain meaning of the section and its history, correctly rejected the argument that the proviso applies only in civil situations; the estoppel provision buttresses that conclusion because the ordinary civil consent decree, entered before testimony is taken, creates no estoppel. See, e.g., *Lawrence Mfg. Co.* v. *Tennessee Cotton Mills*, 138 U.S. 552, 562 (1891); *United States* v. *International Building Co.*, 345 U.S. 502, 506 (1953). Thus, the section read as a whole and in the light of this Court's decision in *Emich* explains why the congressional debates, which virtually comprise the legislative history of the proviso, acknowledged the exemption of guilty-plea judgments from the operation of the section as the proviso's overriding purpose and predictable effect and concentrated on the merit of that expressly intended result.

The concern voiced in the majority opinion below for accommodation of the conflicting policies of the section's main provision and its proviso (App. [illegible]) is consequently misplaced. The policy accommodation Congress intended is plain in the legislative history. The court below would reject the congressional intent and would instead allow the policy of the main provision to annul the policy of the proviso.

3. Fundamental to the majority's rationale was a claimed distinction between *nolo* and guilty plea judgments as "consent judgments" within the meaning of the proviso. The distinction is without logical or historical support; it

rests on reasoning that ignores the realities of the situation and conflicts with Rule 11 of the Federal Rules of Criminal Procedure and with principles enunciated in this Court's decision in *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962).

The majority recognized that neither plea requires the express consent of the government, but it concluded that a *nolo* judgment is a consent judgment because it requires the consent of the defendant and the court, whereas the guilty judgment is not a consent judgment because, in the view of the majority, it requires only the consent of the defendant. In fact, as already indicated at pp. 10-12, *supra*, the legislative history makes it clear that Congress used the term to denote the consent of the defendant. *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366, 376 (D. Minn., 1939).

But even on its own premises, the majority's rationale is fallacious. Rule 11 of the Federal Rules of Criminal Procedure, set forth at pp. 3-4, *supra*, states without qualification that a "court may refuse to accept a plea of guilty . . . ." As pointed out by the Court of Appeals for the District of Columbia, this "permissive clause . . . indicates a general discretion in the court . . ." to refuse guilty pleas. Nor is this provision modified or limited by the further provision that the court "shall not accept the [guilty] plea without first determining that the plea is made voluntarily with understanding of the nature of the charge," for this "mandatory clause . . . [merely] indicates one circumstance where the court has no discretion but must refuse to permit the guilty plea." *Overholser* v. *Lynch*, 288 F.2d 388, 391, 392 (D.C. Cir. 1961).

The Supreme Court specifically approved this analysis of Rule 11, pointing out that its disagreement with the circuit court on another issue "does not mean . . . that a criminal defendant has an absolute right to have his guilty plea

accepted by the court. As provided in Rule 11 . . . the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused." *Lynch*, v. *Overholser*, 369 U.S. 705, 719 (1962). On this point the minority opinion by Mr. Justice Clark is similarly emphatic: to grant a defendant "an absolute right to plead guilty . . . would be *contra* to our concept of the fair administration of justice as exemplified in . . . Rule 11 . . . ." 369 U.S. at 731. Particularly pertinent here is *United States* v. *Willis*, 75 F. Supp. 628, 631 (D.D.C. 1948), which asserts the right of a district court, in the exercise of its discretion to accept or reject a proffered plea of guilty granted it by Rule 11, to take into consideration less onerous consequences accruing to a defendant under the governing statute from a plea of guilty than from a possible verdict of guilty after trial.

It follows that a judgment entered on a plea of guilty is in fact more certainly based on the consent of all concerned than is a *nolo* judgment. For, as Judge Knoch's dissent (App. 7-8) cogently demonstrates, a plea of guilty manifests the mutual willingness of the parties to dispose of the case on the terms offered by one of them, the government, whereas the *nolo* plea can be and often is entered over the objection of the government. E.g., *United States* v. *Safeway Stores, Inc.*, 20 F.R.D. 451, 455-459 (N.D. Tex. 1957); *United States* v. *Cigarette Merchandisers Ass'n*, 136 F. Supp. 212 (S.D. N.Y. 1955); *United States* v. *Jones*, 119 F. Supp. 288 (S.D. Cal. 1954).[5]

5. The majority erroneously asserts that the federal courts in practice follow the recommendation of government attorneys in accepting *nolo* pleas. As Judge Nordbye pointed out in a recent opinion in which he accepted a plea of *nolo contendere* over the government's objection (United States v. Minneapolis-Honeywell

Thus the consent deemed determinative by the court of appeals, the consent of the court, is as much implicit in a guilty plea as in a *nolo* judgment. Normally courts do accept pleas of guilty for, as Judge Knoch pointed out, by such a plea "the government has secured all that the government sought in bringing the charges" (App. 8). Indeed, the disposition of cases by plea—before the trouble and expense of trial is incurred—is ordinarily considered laudably conducive to the interest and proper administration of justice. Because the guilty plea does represent total capitulation to the government's demands, the guilty plea judgment is, moreover, always based on the consent of *all* parties and the court, the same consensual elements present in the civil situation. The *nolo* judgment, as the court of appeals properly held, is unquestionably a consent judgment, based as it is on the consent of defendant and court, even though it is only sometimes consented to by the government. Certainly guilty plea judgments, meeting even a criterion of complete mutuality, must also be termed consent judgments. And particularly should they be so in the circumstances of these actions which involve pleas and judgments entered by the express consent of the parties and the sanction of the court (Dft. App. 4-11).

Regulator Co., Trade Reg. Rep. ¶ 70,863 at p. 78,495 (D. Minn., Jan. 11, 1963):

> "The Government for some years has consistently opposed the acceptance of *nolo contendere* pleas in antitrust proceedings. It appears, however, that since 1955 and up to February, 1963, pleas of *nolo contendere* have been accepted by the United States courts in some 104 antitrust cases out of 142 where pleas of *nolo contendere* have been tendered . . . some 73 per cent of the antitrust cases during the past eight years."

CONCLUSION

For the reasons stated, petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

Dated: January 27, 1964.

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APPENDIX

As reported at 323 F.2d 412 (1963)

COMMONWEALTH EDISON COMPANY et al.,
Plaintiffs-Appellants,

v.

ALLIS-CHALMERS MANUFACTURING COMPANY, et al.,
Defendants-Appellees.

No. 14024.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT.

Sept. 12, 1963.

Rehearing Denied Oct. 30, 1963.

[413]

Before KNOCH, KILEY, and SWYGERT, Circuit Judges.

KILEY, Circuit Judge.

This court allowed plaintiffs[1] to appeal from an order striking from the complaints in 226 related treble damage civil antitrust cases all references to judgments, on pleas of nolo contendere and guilty, entered in the 1960 Philadelphia criminal antitrust cases.

The District Court certified[2] the following question, decided in its order, as an important and controlling question of law in those cases: whether plaintiffs in their private antitrust cases may have the prima facie evidentiary benefit provided by § 5(a) of the Clayton Act[3] with respect to judgments entered on pleas of nolo contendere and guilty

1. In the civil "electrical equipment antitrust" cases.
2. Pursuant to 28 U.S.C. § 1292(b).
3. 15 U.S.C. § 16.

in prior criminal [414] antitrust cases against the same defendants. The question is of first impression in this Circuit.[4]

In § 5(a) of the Clayton Act.[5], Congress provided, *inter alia*, that plaintiffs in treble damage actions could make use of final judgments in prior civil or criminal antitrust proceedings brought by the Government as prima facie evidence of violations of antitrust laws, except in cases terminated by "consent judgments * * * entered before any testimony has been taken." The complaints before us allege the violations by virtue of defendants' pleas and the corresponding judgments in the Philadelphia criminal cases. Defendants moved to strike all references to the prior criminal proceedings.

The District Court granted the motion, deciding that judgments on both nolo contendere and guilty pleas came within the term "consent judgments" in the proviso in § 5(a) and were therefore unavailable to plaintiffs for the prima facie benefit.

We see no merit in plaintiffs' contention that the exclusionary proviso ["* * * this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *"] in § 5(a) does not extend to judgments in criminal cases. We think the plain words of the statute indicate Congress intended to include judgments in criminal cases in the proviso. The main section of § 5(a) uses the words "in any civil or criminal proceeding." The

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4. The question is pending in the U. S. Courts of Appeals for the Fifth and Ninth Circuits.

5. The section [15 U.S.C. § 16] provides, in pertinent part, as follows:

> "(a) A final judgment or decree * * * rendered in any civil or criminal proceeding brought by or in behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States * * *, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *."

exclusionary proviso does not expressly refer either to civil or criminal proceedings; it merely says "judgments or decrees." When the section was originally enacted, however, it contained a temporary proviso, since eliminated, stating: "Provided, further, This section shall not apply to consent judgments * * * rendered in criminal proceedings * * * now pending * * *."

The exclusionary proviso with which we are concerned was located between the clear words in the main section and the temporary proviso. It is our opinion that Congress did not use the term "judgment" in the exclusionary proviso in a sense different from that in the main section and in the temporary proviso. Had Congress intended in the exclusionary proviso to refer only to civil judgments, we think it would have clearly said so.

We do not agree either that in criminal cases there can be no consent judgments. There is ample authority that judgments entered on pleas in criminal cases are within the proviso. Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366 (D.Minn.1939), aff'd. 119 F.2d 747 (8th Cir. 1941), cert. denied, 314 U.S. 644, 62 S.Ct. 84, 86 L.Ed. 516. Barnsdall Refining Corp. v. Birnamwood Oil Co., 32 F.Supp. 308, 311 (E.D.Wis.1940). Alden-Rochelle, Inc. v. ASCAP, 3 F.R.D. 157 (S.D.N.Y.1942). United States v. Standard Ultramarine & Color Co., 137 F.Supp. 167 (S.D.N.Y.1955). Atlantic City Electric Co. v. General Electric Co., 207 F. Supp. 620 (S.D.N.Y.1962).

The decisions in those cases involved pleas of nolo contendere and therefore also support the District Court's ruling that judgments entered on pleas of nolo contendere are within the proviso and thus are unavailable for the prima facie benefit of § 5(a). We agree with Judge Learned Hand's statement that such judgments are "plainly * * * within the [exclusionary] proviso * * *." [415] Pfotzer v. Aqua Systems, Inc., 162 F.2d 779, 784 (2d Cir. 1947).

There are clear elements of consent in a plea of nolo contendere. The plea requires the consent of the District Court. Rule 11, Federal Rules of Criminal Procedure. And in practice pleas of nolo contendere are rarely accepted by

courts without the approval of the Government after compromise negotiations with the Government. The record of the Philadelphia criminal proceedings in the case at bar bears that out. See also Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366, 372 (D.Minn.1939), and 152 A.L.R. 270-271.

The principal issue is whether judgments entered on guilty pleas by defendants in criminal anti-trust actions are within the proviso, and are thus available for the prima facie benefit of §5(a). It is our view that the exclusionary proviso cannot apply to judgments on guilty pleas.

The decisions in Twin Ports Oil Co. v. Pure Oil Co., 26 F.Supp. 366 (D.Minn. 1939) and Barnsdall Refining Corp. v. Birnamwood Oil Co., 32 F. Supp. 308, 311 (E.D.Wis. 1940) involved only the effect of pleas of nolo contendere. This fact weakens the dicta in both cases as to guilty pleas. Also, the record in the case at bar indicates that, despite those decisions, some of the defendants in the Philadelphia proceedings were anxious to avoid guilty pleas.

We see no reason to refer to the congressional debates for the precise meaning of the proviso. Each party here has cited parts of that legislative history with seeming support. We agree with Judge Feinberg in Atlantic City Electric Co. v. General Electric Co., 207 F.Supp. 620, 625 (S.D.N.Y.1962) that the legislative history is "inconclusive" on this question.

We think that Congress did not intend that the proviso include guilty pleas. There is the congressional purpose in enacting §5(a). On this broader question, the legislative history is helpful. The objective was to provide more effective enforcement of the antitrust laws. On the one hand, Congress intended to facilitate the bringing of treble damage suits by private antitrust litigants. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568, 71 S.Ct. 408, 95 L.Ed. 534 (1951). By giving those litigants the prima facie benefit of judgments obtained by the Government, Congress intended to save those private litigants great time and ex-

pense.[6] And there is evidence that the section has had the effect of encouraging private treble damage actions.[7] On the other hand, by enacting the exclusionary proviso, Congress sought to aid antitrust enforcement by encouraging defendants to capitulate, at a saving of time and expense to the Government.[8] Both purposes of § 5(a) and its proviso serve the broad objective of antitrust enforcement, and although the two purposes are distinct, " * * * an [416] accommodation must be made to preserve the essence of both."[9]

Furthermore, a guilty plea is not a consent plea resulting in a consent judgment. The authorities are uniform that the term "consent judgments" applies to judgments entered by courts following the mutual agreement of the parties. The Ansaldo San Giorgio I, 73 F.2d 40, 41 (2d Cir. 1934), aff'd sub nom. The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U.S. 494, 55 S.Ct. 483, 79 L.Ed. 1016 (1935). United States v. Hartford-Empire Co., 1 F.R.D. 424, 427

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6. In a Special Message to the Congress, January 20, 1914, President Wilson stated: "I hope that we shall agree in giving private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government. * * * It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He can not afford, he has not the power, to make use of such processes of inquiry as the Government has command of. Thus shall individual justice be done while the processes of business are rectified and squared with the general conscience." 51 Cong. Rec. 1964 (1914).

7. In 1951, the Assistant Attorney General in charge of the antitrust division of the Department of Justice testified that private suits for treble damages were for the first time becoming of substantial aid to the Department in enforcing the antitrust laws. He referred to those private treble damage suits as "a substantial deterrent." Hearings before the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, on H. R. 2304, 81st Cong., 2d Sess., pt. 3, p. 15. Cited in United States v. Standard Ultramarine & Color Co., 137 F.Supp. 167, 173 (S.D.N.Y. 1955).

8. 51 Cong. Rec. 13824, 16004 (1914).

9. Mr. Justice Harlan, dissenting in Wood v. Georgia, 370 U.S. 375, 396, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

(N.D.Ohio 1940).[10] But a guilty plea in a criminal case is an entirely unilateral act. It does not require the consent of the Government, and there is no authority for the view that courts may reject a plea of guilty, provided it is made "voluntarily with understanding of the nature of the charge." Rule 11, Federal Rules of Criminal Procedure; Atlantic City Electric Co. v. General Electric Co., 207 F.Supp. 620, 626 (S.D.N.Y.1962).[11]

If guilty pleas were held to be within the exclusionary proviso, the private litigant, who is injured by the antitrust violation and who is a subject of Congress' concern in enacting § 5(a), would be, by the defendant's plea of guilty, thereby denied the total benefit of that section. Although that result may achieve one purpose of the section in aiding enforcement of the antitrust laws, we think it would help antitrust violators at the direct expense of the victims of those violations. Congress did not intend to confer a benefit in the body of § 5(a), indicating a primary purpose, and, through the proviso, allow its frustration by the unilateral act of an antitrust violator.

There are also the considerations of self-interest of an accused antitrust law violator. There is no reason for an accused violator to make a defense if guilty pleas are within the proviso. The guilty plea must be accepted, the judgment could not be used in a subsequent treble damage suit and the penalties would almost always be less than the cost of litigation and less painful than a protracted criminal trial. An antitrust defendant in a criminal case would surely consider the effect on its public image and its business that a long trial with damaging evidence might have

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10 Matthews v. Lobley, 132 Tex. 313, 123 S.W.2d 871, 872 (1939); Haggis v. Haggis, 252 Ky. 198, 66 S.W.2d 59 (1933). Black's Law Dictionary, at 978 (4th ed. 1951) gives the following definition: "A judgment, the provisions and terms of which are settled and agreed to by the parties to the action."

11 See also United States v. Morin, 265 F.2d 241, 245 (3rd Cir. 1959), representative of the great number of cases indicating that the discretion allowed by Rule 11 as to guilty pleas is limited to the questions of voluntariness and understanding on the part of the individual defendant.

as compared with the quick and relatively less painful effect of a plea of guilty. That consideration would be even more significant if guilty pleas are within the proviso.

In conclusion, we think that our construction of § 5(a) strikes the balance Congress contemplated between the dual specific purposes of § 5(a). The promotion of private treble damage suits by injured parties and the inducement of capitulation by defendants in proceedings brought by the Government are both valuable in achieving a more effective enforcement of the antitrust laws. Congress intended a choice be made as to the respective values of those purposes by the exercise of the District Court's discretion in a criminal antitrust proceeding. The Court can in a suitable case accept a plea of nolo contendere and save the Government both time and expense; in another case, perhaps where the Government's proof is more than adequate, and the offense of a more serious nature—the court may choose, on Government objection to reject a defendant's capitulation by the nolo plea, thereby serving the specific objective of aiding and promoting the treble damage [417] actions of injured parties. In either case, more effective enforcement of the antitrust laws is achieved, and the choice between the specific objectives of § 5(a) is vested in the District Court, not the antitrust violator.

For the reasons given, the order of the District Court is *affirmed* insofar as it decides that judgments entered on pleas of nolo contendere are within the exclusionary proviso, and *reversed* insofar as it decides that judgments entered on pleas of guilty are within the exclusionary proviso.

KNOCH, Circuit Judge (dissenting):

Reluctantly I find myself unable to agree with Judge Kiley that guilty pleas take a case out of the scope of "consent judgments" within the meaning of § 5(a) of the Clayton Act. I do not follow the reasoning that a plea of guilty cannot be a "consent" to judgment because it requires no further act by the government and may not be rejected by the court, if it is voluntarily made with understanding of the nature of the charges.

A plea of guilty is not a unilateral act taken by the defendant in a legal vacuum. It is a direct response to accusations by the government. The accused accepts those accusations without proof. He agrees to the government's allegations of fact and consents to whatever judgment the court may impose. There is nothing further for the government to do; the government has prevailed; the government has secured all that the government sought in bringing the charges. It is as though an offer were made and accepted as it stands. Such an acceptance is not a counter-offer requiring the further consent of the offeror to make a contract.

Further, I do not find the legislative history "inconclusive." My study of it leads me to the conclusion that a primary Congressional purpose was to induce capitulation of defendants to avoid protracted litigation and to impose additional burdens by way of simplifying individual civil suits only against those who exposed the government to extended and expensive unnecessary trials.

As a plea of nolo contendere requires the approval of the court which may or may not be given, the sole way in which a defendant can conclusively consent to judgment is by way of a plea of guilty.

I would affirm the judgment of the District Court.